

Brennan (Migration) [2021] AATA 2040 (20 May 2021)

- 1.
- 2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Ciaran Brennan Ms Jade Louise Bytheway Master Finn James Brennan
CASE NUMBER:	1824466
HOME AFFAIRS REFERENCE(S):	BCC2017/2256474
MEMBER:	Andrew McLean Williams
DATE:	20 May 2021
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the applications for Temporary Business Entry (Class UC) visas for reconsideration, with the direction that: - the first-named applicant meets Public Interest Criterion 4020 for the purposes of cl 457.224 of Schedule 2 to the Migration Regulations; - the other applicants meet clause 457.321 in Schedule 2 of the Migration Regulations.

Statement made on 20 May 2021 at 11:28am

CATCHWORDS

MIGRATION – Temporary Business Entry (Class UC) visa – Subclass 457 (Temporary Work (Skilled)) – false or misleading information in visa application – applicant convicted of offences in Ireland – disclosing convictions on his juvenile record – compassionate or compelling circumstances – job skills hard to replace – impact on employer – decision under review remitted

LEGISLATION

*Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, r 1.03; Schedule 2 cls 457.224, 457.321; Schedule 4 PIC 4020*

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 16 August 2018 refusing to grant the applicants Temporary Business Entry (Class UC) visas, under s 65 of the *Migration Act 1958* (Cth) ('the Act').
4. The applicants applied for the visas on 26 June 2017. The delegate refused to grant the visas on the basis that the first-named applicant ('the applicant') did not satisfy the requirements of cl 457.224 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations), because the applicant did not satisfy public interest criteria ('PIC') 4020, which requires that there be no evidence before the Minister that the applicant has given, or caused to be given, either a 'bogus document', or information that is false or misleading in a material particular in relation to the application for the visa, or a visa that the applicant held in the twelve months before the application was made.
5. The applicant appeared before the Tribunal on 23 March 2021 to give evidence and make submissions. The Tribunal also received documentary evidence and some statutory declaration evidence, that was submitted to the Tribunal prior to the hearing.
6. The applicants were represented in relation to the review by their registered migration agent, Ms Jayme Hallam (MARN 0636702) of JL Hallam and Partners Pty Ltd. Ms Hallam did not attend the Tribunal hearing, yet had arranged for the submission of supporting evidence prior to the hearing.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 ('PIC 4020') as required by cl 457.224 for the grant of the visa. PIC 4020 requires that:
 - there be no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is now **extracted** in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies irrespective of whether the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. In this case there is no suggestion of the applicant having provided bogus documents, as defined. According to the decision record for the decision now under review, the applicant's breach of PIC 4020 arose in the following circumstances:
- On 23 April 2013, the applicant - who is a trade-qualified carpenter and an Irish national - lodged a Subclass 457 visa application, ID Reference 1690556454. As part of that application, the applicant declared that he had not been convicted of a crime or offence in any country, including any conviction that has since been removed from official records.
 - On 26 June 2013 the applicant was granted a Subclass 457 visa for the ensuing period of four (4) years.
 - On 26 June 2017, the applicant lodged a new Subclass 457 visa application, ID Reference 2025600946. As part of the new application, the applicant declared that he had been previously convicted of an offence in another country. The applicant attached to his application a police clearance certificate ('PCC') from the United Kingdom, that dated 22 April 2017. The PCC notes convictions during the period 11 January 1998 to 18 July 2000, in Ireland.
 - In light of the foregoing, a delegate formed the preliminary view that the applicant had failed to declare his criminal convictions during the process of applying for the initial 457 visa, that being the visa held by him in the 12 months prior to the current visa application. On 12 October 2017, the department wrote to the applicant about this, inviting him to comment, and requesting that he submit any information or other evidence regarding any compassionate or compelling circumstances that impacted

the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen.

- The applicant submitted various evidence to the delegate, on 6 November 2017. Ultimately, the delegate was not persuaded as to the sufficiency of that information insofar as it may afford grounds for waiver of PIC 4020.

14. As this is an application for review before the Tribunal, it is now for the Tribunal to determine whether there is evidence before it in relation to a breach of PIC 4020 and whether there are grounds to exercise the discretion in PIC 4020(4) to waive the requirements of any or all of PIC 4020(1)(a) or (1)(b). These provisions provide:

15.

16. **4020 (1)** There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

17. (a) the application for the visa; or

18. (b) a visa that the applicant held in the period of 12 months before the application was made.

19.

20. .../

21.

22. (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

23. (a) compelling circumstances that affect the interests of Australia; or

24. (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

25. justify the granting of the visa.

26. The applicant was born and raised in Northern Ireland, and is now 39 years of age. He arrived in Australia for the first time when he was aged about 32. In his oral evidence the applicant readily admitted to his having accrued the following convictions as a very young man:

- 3 June 1998 (when aged 17): disorderly behaviour (fined £30);
- 22 September 1998 (when aged 18) criminal damage: (conditional discharge and ordered to pay restitution of £120);
- 10 August 1999 (when aged 19): criminal damage and disorderly behaviour (Community service, aggregating 60 hours)

- 30 November 2001 (when aged 19): attempted robbery (custody/probation order). The applicant served one year in a youth facility followed by 8 months on probation.

27. In relation to the circumstances of this offending behaviour, the applicant explained as follows:

- **3 June 1998:** the applicant and a group of friends had been listening to music and drinking alcohol, on a street corner. Neighbours complained about the noise. Police arrived, and the applicant and his friends were arrested;
- **22 September 1998:** The applicant was refused service in a newsagency. He became upset and knocked over a news-stand, and he pushed the cash register. Later, the police came to his house and he was arrested.
- **10 August 1999:** The applicant and a group of friends were kicking a football on a street corner. He accidentally kicked the ball too far, and it broke a shop window (of the same newsagency as the prior incident on 22 September 1998). The shopkeeper came out and yelled at him, and the applicant yelled back. The police were called again, and the applicant was arrested.
- **30 November 2001:** The applicant was unemployed at the time, and he spent a lot of time drinking alcohol in the streets with older youths. Whilst very heavily intoxicated one day, one of them suggested they attempt to get some money and the applicant foolishly agreed. They tried to rob a store, albeit clumsily and entirely unsuccessfully. The applicant was arrested.

28. The applicant says that he was dealt with in Ireland as a young offender and was - at least until more recently - of the common understanding that he did not need to disclose convictions on his juvenile record: hence the reason for his not declaring these when making his original Subclass 457 visa application on 23 April 2013. However, when he re-applied for a subclass 457 visa four years later on 26 June 2017 the applicant says that he read the requirements on the application form more closely, and realised that he was required to declare even juvenile or 'spent' convictions, hence the reason why these convictions, not previously declared by him on the first Subclass 457 visa application, were declared by him on the occasion of his renewed Subclass 457 visa application.

29. In light of the admissions made by the applicant it is the case that information that was false in a material particular was given to the Minister in relation to the visa held by the applicant in the period of 12 months prior to the second Subclass 457 visa application made on 26 June 2017. Therefore, the applicant **does not meet** PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

30. As indicated in foregoing passages of these reasons, the requirements of PIC 4020(1) and (2) may be waived, if there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

31. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The

ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others. Although there are not here any 'compassionate' circumstances, the Tribunal is nonetheless satisfied that there are compelling circumstances that do arise in this case.

32. The Tribunal is then further satisfied that the requirements should be waived, for the reasons that follow:
33. The applicant is a trade qualified carpenter and a long-term employee of Curtis Fixers Pty Ltd, trading as Everlast Fixing. His employer, a Mr Atilio Portillo, has provided a statutory declaration in support of the applicant now being granted the visa, declared by Mr Portillo at Brisbane on 10 March 2021. Mr Portillo also acknowledges his awareness of the applicant's prior convictions in Northern Ireland. By means of that statutory declaration, Mr Portillo informs the Tribunal of the following:
- The applicant is a highly skilled and conscientious employee who can be relied upon to work autonomously - without the need for either close supervision or instruction.
 - The applicant has very good leadership skills on jobsites, as well as the ability to reliably interact with clients, subcontractors, head contractors and suppliers. Mr Portillo does not feel confident that he could easily replace the applicant given his skillset.
 - The work undertaken by Everlast Fixing is performed in the context of very stringent contractual arrangements, with tight timeframes and onerous penalty clauses applying to instances of contractual non-performance.
 - Everlast Fixing has come to rely upon the skills, experience and aptitude of the applicant. His loss to the enterprise - in the event that the applicant were required to leave Australia due to visa difficulties - would have what Mr Portillo considers as 'catastrophic consequences' for the business operations of Everlast Fixing.
 - Mr Portillo requires the ongoing presence of the applicant as a site supervisor in order for Everlast Fixing to consistently meet its contracted work delivery obligations. Mr Portillo considers that the presence of the applicant as a 'known entity' at Everlast Fixing is a matter that contributes significantly to his company being awarded repeat work from its existing clientele.
34. In light of the foregoing, the Tribunal is sufficiently persuaded that there are 'compelling circumstances' of the kind contemplated in PIC 4020(4)(1)(a), and that these are now **sufficient to warrant a waiver of the PIC 4020 requirements**.

35. **Has the applicant satisfied the identity requirements?**

36. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal has seen a copy of the applicant's passport and is therefore satisfied as to his identity.
37. Therefore, the applicant **meets** PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

38. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA). There is no

evidence before the Tribunal suggesting that the applicant nor any family member have ever previously been refused a visa in consequence of a failure to satisfy the identity requirements in PIC 4020 (2A).

39. Therefore PIC 4020(2B) **does not apply**.
40. On the basis of the above, the applicant **does** satisfy PIC 4020 for the purposes of cl 457.224.

DECISION

41. The Tribunal remits the applications for Temporary Business Entry (Class UC) visas for reconsideration, with the direction that the first-named applicant meets the following criteria for Subclass 457 (Temporary Work (Skilled)) visas:
 - Public Interest Criterion 4020 for the purposes of cl 457.224 of Schedule 2 to the Regulations; and
 - The other visa applicants satisfy clause 457.321

Andrew McLean Williams
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...